and the paper at a reasonable price.[23] Of course, the Clayton Law with its stringent provisions may have done away with the possibility of interlocking restrictions,[24] but the Court refused unfortunately to consider this case in connection with the more recent statute or to pass upon whether the law itself was retroactive. Consequently, the decision appears regrettable from a number of points of view. Perhaps the field of administration would be so vastly enlarged, in case interlocking restrictions were allowed, that the system is impossible of practical solution and ought to be subject to the rule enunciated by the Court, but if the science of administration could be so successfully developed as adequately to cope with the possible and even probable resultant abuses, the consumer, as well as the manufacturer, would clearly be the real beneficiary. The Supreme Court by these decisions seems to have accomplished a result which, beside appearing economically questionable, distinctly limits the patentee's exclusive right to make, vend, and use.

RIGHTS OF LICENSEE AGAINST THIRD PARTIES.—Every license which is not a bare excuse for a trespass has contractual or property elements connected with it upon which the rights of the licensor in law or in equity depend. Thus the giving of a right to cut and take away timber conveys not only a license but a property right in the timber as it is

[23]The first case treating the validity of interlocking restrictions is the Button Fastener case (6 C. C. A. 1896) 77 Fed. 288, in which the patentee required the purchaser of a patented article for fastening buttons on shoes to use it only with staples made by the patentee. It was held that the buyer obtained title to the tangible machine but, as to the right to use, he was a mere licensee. Cortelyou *v.* Lowe (2 C. C. A. 1901) 111 Fed. 1005; *cf.* Rupp v. Elliott (6 C. C. A. 1904) 131 Fed. 730. This restriction has been limited to cases where the unpatented articles were not public commodities or the ordinary commodities of life. Cortelyou *v.* Johnson (2 C. C. A. 1906) 145 Fed. 933; see Crown Cork & Seal Co. *v.* Brooklyn Bottle Stopper Co. (C. C. 1909) 172 Fed. 225.

[24]One turns with regret from the decision of the District Court in United States *v.* United Shoe Machinery Co. (Mass. 1915) 222 Fed. 349, to the Missouri District Court's decision handed down in 1916 in 234 Fed. 127. In the former case the validity of interlocking restrictions was upheld where all the articles included are patented and a lower rate is given when the machines are used together. In the latter the trust was dissolved under the exceedingly stringent provisions of the Clayton act. The dissolution of this concern when the prices were shown to be reasonable and the manufacturers using the machines satisfied is certainly of doubtful value. The machines in question were those used in one part of the manufacture of the shoe and had to be carefully adjusted to one another so that the work could be continuous. Under the Clayton Law it may be that the very appearance of evil must be guarded against and that the rule of reasonable restraint has been to some extent abrogated by section three. This would be unfortunate. "To lay down a flat rule", such as this, "and enforce it though the heavens fall, smacks of a stage of our law when legal principles had not attained diversification, and the science of administration was as yet unborn." 29 Harvard Law Rev. 447. Whether this will be the ultimate interpretation of the Clayton act is still open to question. See the decision of Hough, *J.*, in Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co. (D. C. 1915) 224 Fed. 566, and Gilbert H. Montague, The Federal Trade Commission and The Clayton Act, in "Some Legal Aspects of Corporate Financing", p. 299 *et seq.*

cut,[1] and if there is also a contract to sell the timber, a contractual right is likewise created.[2] At common law these various rights are carefully differentiated, a licensee being protected only in those cases where his license is "coupled with an interest".[3] In such instances it is in reality the interest and not the license which is protected,[4] but even this protection is only afforded provided the interest is in property and not purely contractual in nature.[5] If the attempted grant, consequently, is within the Statute of Frauds, the licensee acquires no rights as against the licensor,[6] but he is protected as against third parties.[7] If it is not a recognized property right, however, law will not protect the licensee at all.[8]

Courts of equity in dealing with this problem have two difficulties to face, the Statute of Frauds, and the recognition as property rights of interests which are not so regarded at law. As to the first, the parties may intend a parol gift or contract for an interest in land. If this is their real intent, the doctrine of part performance is applicable.[9] But where no intent to convey an interest in land exists the weight of authority agrees that no equitable rights in favor of the licensee can arise.[10] In some jurisdictions where the licensor may be estopped despite the Statute from revoking the licence by reason of the licensee's

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[1]White *v.* King (1891) 87 Mich. 107, 49 N. W. 518; Cool *v.* Peters Box Co. (1882) 87 Ind. 531. Before any trees are cut, the license is revocable and the licensee remitted to his action on the contract. See Fletcher *v.* Livingston (1891) 153 Mass. 388, 26 N. E. 1001.

[2]Kerrison *v.* Smith [1897] 2 Q. B. 445. Such contracts may amount to the sale of an interest in land. White *v.* Foster (1869) 102 Mass. 375.

[3]Long *v.* Buchanan (1867) 27 Md. 502; *cf.* Wood *v.* Leadbitter (1845) 13 M. & W. *838; Fletcher *v.* Livingston, *supra*; but see Butler *v.* Manchester etc. Ry. (1888) 21 Q. B. D. 207.

[4]Brown, Statute of Frauds (5th ed.) § 27.

[5]*Cf.* Hill *v.* Tupper (1863) 2 H. & C. *121. Theatre tickets constitute the leading example of rights purely contractual; by the great weight of authority they are revocable although the licensor commits a breach of contract in so doing. Horney *v.* Nixon (1905) 213 Pa. 20, 61 Atl. 1088; Shubert *v.* Nixon Co. (1912) 83 N. J. L. 101, 83 Atl. 369; Marrone *v.* Jockey Club (1913) 227 U. S. 633, 33 Sup. Ct. 401; *contra,* Hurst *v.* Pictures Theatres Ltd. [1915] 1 K. B. 1. The last cited case was not decided purely on common law grounds, since the right of the ticket-holder to recover in tort was based on the assumption that equity would have enjoined his expulsion. See 31 Law Q. Rev. 217.

[6]Foot *v.* New Haven etc. Co. (1854) 23 Conn. 214; Kamphouse *v.* Gaffner (1874) 73 Ill. 453; *cf.* Banghart *v.* Flummerfelt (1881) 43 N. J. L. 28; see Lawrence *v.* Springer (1892) 49 N. J. Eq. 289, 24 Atl. 933.

[7]Miller *v.* Greenwich (1898) 62 N. J. L. 771, 42 Atl. 735; Cool *v.* Peters Box Co., *supra.*

[8]Hill *v.* Tupper, *supra*; Stockport Waterworks Co. v. Potter (1864) 3 H. & C. 300.

[9]Frogley *v.* Earl of Lovelace (1859) Johnson 333; *cf.* Nat. Stock Yards *v.* Wiggins Ferry Co. (1884) 112 Ill. 384; Wisemann *v.* Lucksinger (1881) 84 N. Y. 31; Jackson Sharp Co. *v.* Phila., etc. R. R. (1871) 4 Del. Ch. 180.

[10]Minneapolis Mill Co. *v.* Minneapolis etc. Ry. (1892) 51 Minn. 304, 53 N. W. 639; Crosdale *v.* Lanigan (1892) 129 N. Y. 604, 29 N. E. 824; Morse *v.* Lorenz (1914) 262 Ill. 115, 104 N. E. 237; Lawrence *v.* Springer, *supra*; *contra,* Rerick *v.* Kern (Pa. 1826) 14 S. & R. 267; Messick *v.* Midland Ry. (1890) 128 Ind. 81, 27 N. E. 419; see United States *v.* Baltimore & Ohio Ry. (D. C. W. Va. 1875) 24 Fed. Cas. No. 14510.

expending money on the faith thereof, it would seem that an equitable property right has been created which will be protected as against third parties.[11]

Assuming that the right is something which cannot be the subject of grant at common law, there is more difficulty in equity affording its protection. It is, of course, settled that the malicious interference with contract rights may give rise to a tort action at law[12] or to a right to injunctive relief in equity.[13] But it is open to question whether the protection thus afforded is to the contract itself or to its subject matter. Of course, where the petitioner has an adequate legal remedy on his contract no injunction prohibiting third parties from inducing a breach of contract will issue.[14] It is conceivable, however, that although the contract does not involve a transfer of property rights, the legal remedy may be grossly inadequate. Such a situation arose in the recent case of *Sports etc. Agency* v. *"Our Dogs" Pub. Co.* [1916] 2 K. B. 880, aff'd. (Ct. of App.) 61 S. J. 299, where the proprietor of a dog show gave to the assignor of the plaintiff an exclusive right to take pictures of the show. The defendant also took pictures, although he had notice of the plaintiff's rights, and the action was in equity to restrain the defendant from publishing his pictures. The court refused to grant relief, seemingly on the ground that the plaintiff had no property which he could acquire by assignment and which equity would protect. The decision thus amounts to a holding that equity will not protect rights purely *in personam*.

As a matter of theory the result is not to be commended. Strictly speaking, all contractual rights are obligations *in personam*, and are so treated in law.[15] The tendency in equity has been to treat the personal obligation of the contract as giving, through the possibility of enforcement of such personal obligation, some sort of right *in rem* in the subject-matter.[16] However, the more recent cases show a desire to break away from the narrow view that equitable rights can only exist in what law considers property, and the courts are attaining a broader result either by creating new property rights by way of analogy,[17] or, by requiring only that "the act complained of will result, even though somewhat remotely, in injury to property."[18] Consequently it would seem that equity can now specifically enforce contracts to secure purely personal rights, where there is even a remote injury

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[11]Philips *v.* Cutler (1915) 89 Vt. 233, 95 Atl. 487; see Baldock *v.* Atwood (1891) 21 Ore. 73, 26 Pac. 1078; *contra,* Dark *v.* Johnston (1867) 55 Pa. 164. *A fortiori,* where there is a parol contract which equity might specifically perform. See Churchill *v.* Russell (1905) 148 Cal. 1, 82 Pac. 440.

[12]Burdick, Law of Torts (3rd ed.) § 96; Pollock, Law of Torts (10th ed.) 347.

[13]Exchange Telegraph Co. *v.* Central News Ltd. [1897] 2 Ch. 48.

[14]2 High, Injunctions, § 1107.

[15]Pollock, *op. cit.* 572; 31 Law Q. Rev. 222n.

[16]17 Columbia Law Rev. 376.

[17]Exchange Tel. Co. *v.* Gregory & Co. [1895] 1 Q. B. 147; Borough Bill Posting Co. *v.* Levy (1911) 144 App. Div. 784, 129 N. Y. Supp. 740; Prest-o-lite Co. *v.* Davis (D. C. S. D. Ohio, 1913) 209 Fed. 917, aff'd. 215 Fed. 349.

[18]National Tel. Co. *v.* Western Union Tel. Co. (7 C. C. A. 1902) 119 Fed. 294, 300.

to property, and should therefore protect the impairment of such rights at the hands of strangers.

This should be decisive of the principal case. Moreover there is no practical reason why equity should not protect a personal obligation of this type, since it is quite as unconscientious for a third party to interfere with a personal contract as it is to interfere with a contract for the sale of land. The sole reason for distinction between the cases is in the adequacy of the legal remedy. If the inadequacy of the legal remedy under the facts of the principal case is conceded, the result reached must be considered as at least doubtful on principle, and illiberal in its practical effect.[19]

MUTUALITY AS AFFECTING SPECIFIC PERFORMANCE OF CONTRACTS RELATING TO OPTIONS.—A loose use of the term "mutuality" and a willingness on the part of the courts to adopt a rule and apply it broadcast, without analysis of the reasoning behind the rule and its applicability to the particular case at hand, has led to a quagmire of conflicting authority on the question of specific performance.

It is laid down generally that equity will not specifically enforce a contract unless there is mutuality of obligation and of remedy.[1] Yet one who has not signed the memorandum of a contract for the sale of land may have specific performance against the party who has signed.[2] Similarly a plaintiff will not be denied relief simply because he was an infant when he entered the contract;[3] and a vendor who has good title at the time of the decree will not be denied relief solely on the ground that his title was unmarketable at the time the contract was made.[4] Again, in the case of a bilateral contract performed

[19]One questionable solution of the problem is to call every obligation a property right. See 1 Harvard Law Rev. 9.

[1]Fry, Specific Performance (3rd ed.) § 460; Pomeroy, Specific Performance (2nd ed.) §§ 162-163.

[2]Ullsperger *v.* Meyer (1905) 217 Ill. 262, 75 N. E. 482. This is true whether the plaintiff is vendor, Armstrong *v.* Maryland Coal Co. (1910) 67 W. Va. 589, 598, 69 S. E. 195, or vendee. Fox *v.* Hawkins (1912) 150 App. Div. 801, 135 N. Y. Supp. 245. The theory is that the plaintiff by filing his bill renders the obligation mutual and enables the court to protect the defendant while aiding the plaintiff. See Richards *v.* Green (1872) 23 N. J. Eq. 536. Originally, mutuality both of obligation and remedy were required as of the date of the contract and therefore relief was refused in such cases as these. Duval *v.* Myers (1850) 2 Md. Ch. 401; Houser *v.* Hobart (1912) 22 Idaho 735, 127 Pac. 997. If the contract is by parol, such part performance as would render it impossible for the parties to be put *in statu quo* will take the case out of the Statute of Frauds and enable equity to grant relief. Williams *v.* Carty (1910) 205 Mass. 396, 91 N. E. 392; Young *v.* Overbaugh (1895) 145 N. Y. 158, 39 N. E. 712 (promise of gift); *cf.* Milholland *v.* Payne (1915) 169 App. Div. 712, 155 N. Y. Supp. 773.

[3]Clayton *v.* Ashdown (1715) 9 Vin. Ab. 593 (G. 4) 2. Otherwise where the plaintiff is an infant at the time of the decree. Flight *v.* Bolland (1828) 4 Russ. 298.

[4]Jenkins *v.* Fahey (1878) 73 N. Y. 355; Gibson *v.* Brown (1905) 214 Ill. 330, 73 N. E. 578; Gerba *v.* Mitruske (1915) 84 N. J. Eq. 79, 141, 94 Atl. 34; but *cf.* Ten Eyck *v.* Manning (1893) 52 N. J. Eq. 47, 27 Atl. 900. Where time is of the essence, the vendor must have good title at the date called for by the contract. Smith *v.* Browning (1916) 171 App. Div. 278, 157 N. Y. Supp. 71.